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PRESIDENT ROOT. I have the pleasure to present to the Society Mr. Lester H. Woolsey, former Solicitor for the Department of State, who will speak on topic illustrative of the work of Subcommittee No. 1, "The munitions trade."

THE MUNITIONS TRADE

ADDRESS BY LESTER H. WOOLSEY

Former Solicitor for the Department of State

Being a member of Subcommittee No. 3 and not of No. 1, I have not had the advantage of the discussion in Subcommittee No. 1 or of studying its preliminary report. I hope what I have to say, therefore, will not be at variance with the conclusions of that subcommittee.

The munitions trade is an old subject of controversy between nations. They have considered it for at least a century and a half. It is beyond me, therefore, to say anything new. Perhaps then I may be excused if I approach the subject by a brief review of the practice of nations.

In the seventeenth and eighteenth centuries engagements were occasionally entered into between governments not to allow individuals to ship arms and other war supplies to the enemy or rebels of either party. Treaties of this sort were made between Spain and England in 1604,¹ England and Holland in 1654, France and Denmark in 1663, England and Denmark in 1670,² France and Hamburg in 1769 and France and Mecklenburg in 1779. It will be observed that these treaties apply to the enemy of either party but not to both belligerents—in a sense treaties of alliance. During the same period, certain sovereignties prohibited by law their subjects from supplying a belligerent with arms. This was done by Bavaria in 1697, Hamburg in 1778, the Pope in 1779, the Sicilies in 1778, Venice in 1779, Sweden in 1779, Denmark in 1756. And the states which joined the Armed Neutrality of 1780–1783 bound themselves to enact similar prohibitions,—Russia, Denmark, Sweden, Prussia, Holland, the Roman Emperor, Portugal, and Sicily were involved.³

In the Napoleonic wars England complained of the purchase of arms in the United States by France.⁴

In the Crimean War, Austria, Sweden, Norway, Denmark, Naples, Sardinia and Tuscany prohibited their ships from carrying contraband; Hanover extended this prohibition to all ships leaving her ports; Hamburg, Bremen and Lubeck prohibited the exportation altogether; and Spain, Oldenburg and Mecklenburg had less strict regulations.⁵ Prussia on the other

¹ And again in 1814. Geffcken, *Die Neutralität*, §152.

² And also in 1780 and 1814. Calvo, *Le Droit Int.* 2d Ed. §1059.

³ Einicke, *Rechte und Pflichten der Neutralen Mächte im Seekrieg, &c.*, 1907, pp. 80–112.

⁴ Lawrence, *Principles of Int. Law*, 1910, p. 699.

⁵ Einicke, *op. cit.* pp. 80–112.

hand not only did not prevent the shipment of arms to Russia, but actually authorized such trade.⁶

In the American Civil War, Germany exported arms with great vigor,⁷ and the North purchased about £2,000,000 worth of warlike stores in England⁸ but the Union Government did not like the trade in munitions going on between England and the Confederacy and was not slow to voice its views.⁹

In the Franco-Prussian War of 1870 a bill was introduced in the British Parliament to change the existing laws on the shipment of arms and ammunition and it was rejected in the House of Commons and House of Lords. When the Prussian Government complained that shipments were being made by Great Britain to France, Lord Granville did not deny the fact but asserted that Great Britain had invariably assumed the same attitude under similar circumstances when she was not bound to contrary action by treaty.¹⁰ Doctor Lushington, of the High Court of Admiralty, had likewise interpreted the Law of Nations.¹¹ The United States followed the same course. However, Austria, Belgium, Denmark, Italy, Spain and Switzerland prohibited the exportation and transit of munitions, Belgium and Switzerland¹² on account of their permanent neutrality. Sweden, Portugal, and Spain restricted the transportation of war supplies, while Chile and Peru prohibited the sale of contraband.¹³

In the Russo-Turkish War of 1877-78 great shipments of guns were sent to Turkey and to Russia by the Krupps without objection on the part of the belligerents.¹⁴ And England affirmed the right of her subjects to export arms to Turkey, while Austria revived her restrictions of 1870 on the transportation of contraband under the Austrian flag.¹⁵

In the Chino-Japanese War of 1894 and the Greco-Turkish War of 1897 there was very little practice,¹⁶ on account of the remoteness of the conflict.

In the Spanish-American War of 1898, Holland prohibited the export of munitions, while Sweden, Norway, Denmark, Portugal, Brazil, Haiti, China, and Colombia placed more or less restriction on their transportation or delivery.¹⁷

⁶ Calvo, *op. cit.* §1059.

⁷ Geffcken, *op. cit.* §152.

⁸ Beresford and Boyd's Wheaton, *Int. Law*, 1904, p. 671.

⁹ Lawrence, *op. cit.* 1910, p. 700.

¹⁰ Calvo, *op. cit.* §1059.

¹¹ Creasy, *First Platform of Int. Law*, p. 606.

¹² Rivier, *Principes du Droit du Gens*, 1896, pp. 408, *et seq.*

¹³ Einicke, *op. cit.* pp. 80-112.

¹⁴ Bonfils, *Manual de Droit Int. Public par Fauchille*, 1901, pp. 7 and 8.

¹⁵ Einicke, *op. cit.* pp. 80-112.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

In the Boer War, Great Britain purchased great quantities of war supplies in the United States and even established quasi-supply bases at Chalmette, La., and Lathrop, Mo., under the control of British Army officers in citizens clothes.¹⁸ Germany sold to Great Britain hundreds of thousands of kilos of munitions, and Austria sold smaller quantities.¹⁹

During the Russo-Japanese war, Denmark, Portugal, Sweden, Norway and China placed similar restrictions on the munitions trade.²⁰

During the Turkish-Italian War, French munition makers filled orders for both belligerents²¹ and it appears that Germany furnished arms and ammunition to the Ottoman Government.²²

During the Balkan Wars both Germany and Austria-Hungary supplied munitions to the belligerents.²³

From this review it will be seen that no uniform practice has existed among nations. Yet the practice has not been so irregular as this account would lead one to suppose. The larger Powers have stood for freedom of trade in contraband by individuals. England and the United States have always maintained the legality of the trade. The doctrine has always been upheld by the United States as being the established rule of international law. It was asserted in 1793 by Mr. Jefferson, in 1796 by Mr. Pickering, in 1855 by Mr. Marcy, in 1862 by Mr. Seward, in 1885 by Mr. Bayard, in 1891 by Mr. Blaine, in 1896 by Mr. Olney, and on many other occasions.²⁴ It is confirmed by the United States Supreme Court by J. Story in *The Santissima Trinidad*²⁵ and other cases.

France, Italy, Germany and latterly Austria-Hungary also allowed the trade. On the other hand, the smaller nations, while not denying the right to trade, have frequently prohibited or restricted the trade, for the purpose of avoiding embarrassment or controversy with powerful belligerents. England and France have empowered their governments to impose certain restrictions, but these were evidently not aimed to maintain their neutrality so much as to provide for the national defense in case of necessity.

As to the opinions of jurists on the legality and propriety of trade in munitions by neutrals, I made a careful examination of the principal authorities for the Secretary of State in 1915 when the note to Austria-Hungary of August 12th of that year was prepared. The net result of that examination was, as stated in that note, that "less than one-fifth of the authorities consulted advocate unreservedly the prohibition of the export of contraband."

¹⁸ Merignhac, *Traité de Droit Public Int.*, 1912, pp. 525 *et seq.*

¹⁹ Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Aug. 12, 1915, Spl. Supp. *Am. Jour. Int. Law*, IX, 166.

²⁰ Einicke, *op. cit.* pp. 80-112.

²¹ Merignhac, *op. cit.* 1912, pp. 525, *et seq.*

²² Mr. Lansing to Mr. Penfield, *supra*.

²³ *Idem*.

²⁴ Fenwick, *The Neutrality Laws of the United States*, p. 104.

²⁵ 7 Wheaton, 340.

At this point a word may be added in regard to a government engaging in the munitions trade. It has long been well established that neutral governments are not to traffic in arms with belligerents. It is reported that the American Government sold large quantities of arms (\$4,000,000 worth) to France in 1870 through middlemen, but Prussia appears not to have protested to the United States,²⁶ a fact which casts some doubt on the truth of the report. In 1894 it is said that the Swiss Government sold rifles to China through British merchants.²⁷ Nevertheless these instances, if really violations of the rule, are isolated and disapproved. Publicists are unanimously opposed to neutral governments engaging in munitions trade in time of war.

To summarize, it may be said that neutral citizens may trade in arms, ammunition and stores of all kinds in time of war, subject to the risk of such goods being captured and confiscated by the belligerent. One exception has grown up in modern times, namely trade in munitions so as to make neutral territory a base of naval operations or military expeditions. Yet, whenever trade in munitions reaches considerable dimensions to the disadvantage of one belligerent, its adversary is apt to complain, but the answer invariably is that international law does not require the neutral government to interfere to prevent their citizens from engaging in such commerce, or to protect them in pursuing it.

So this was the situation at about the time of the Second Hague Conference in 1907. That conference agreed to provisions on the subject in Convention No. XIII relating to Naval Warfare, reading as follows:

Article 6. The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of warships, ammunition, or war material of any kind whatever, is forbidden.

Article 7. A neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to any army or fleet.²⁸

These rules seem reasonably clear and nations have followed them without much confusion. In the recent World War, Spain, Denmark, Sweden, Norway, Holland, Switzerland, China and Brazil prohibited the exportation of arms and ammunition, while the United States became the chief arms factory among the neutrals and maintained the consistency of its traditional policy on this question.

Notwithstanding the practice of the great Powers for a century, and the peculiarly consistent practice of the United States in allowing its citizens to engage in the contraband trade with both belligerents, and notwithstanding the clear provisions of The Hague Conventions on this subject, Germany and Austria-Hungary made formal complaints to the United States

²⁶ Rivier, *op. cit.* 1896, pp. 408, *et seq.*; Nys *Le Droit Int.*, 1906, Vol. 3, pp. 636, *et seq.*

²⁷ *Ibid.*

²⁸ Practically identical with Article 7 Convention No. V, War on Land.

in 1915 against the extensive trade in munitions with the Allies from which the Central Powers were cut off. So history repeats itself. In its note of February 16, 1915, Germany admitted the formal right of neutrals to engage in such trade and even "not to protect their legitimate trade with Germany and even to allow themselves knowingly and willingly to be induced by England to restrict such trade." Germany added that "it is not less their good right . . . to stop trade in contraband, especially the trade in arms with Germany's enemies." This was made the ground in the same note to announce the policy of destroying contraband trade by submarine warfare.²⁹ The complaint was repeated April 4, 1915.

The United States, in a note of April 21, 1915, stood on the ground that a "change in the laws of neutrality during the progress of the war which would affect unequally the relations of the United States with the nations at war would be an unjustifiable departure from the principle of strict neutrality."

Germany later admitted the full right of the Allies to purchase arms in the United States under The Hague Conventions.

Austria's protest came on June 29, 1915, and while admitting the formal right of neutrals to trade in munitions under the text of The Hague Conventions, pointed out that the preamble of Convention XIII allowed neutrals to alter their laws during the progress of war "where experience has shown the necessity thereof for the protection of its rights." Austria referred to the right of the United States to ship foodstuffs to the Central Powers which was illegally prevented by England. She desired to have the United States threaten the Allies with prohibition of exportation of contraband unless they let food ships through, *i.e.*, to bring about a parity between the two groups of belligerents. As this calls into question the statement of the law on munitions trade in the Hague Conventions, it is well enough to read the preamble of Convention XIII referred to by Austria:—

Seeing that, even if it is not possible at present to concert measures applicable to all circumstances which may in practice occur, it is nevertheless undeniably advantageous to frame, as far as possible, rules of general application to meet the case where war has unfortunately broken out;

Seeing that, in cases not covered by the present convention, it is expedient to take into consideration the general principles of the law of nations;

Seeing that it is desirable that the Powers should issue detailed enactments to regulate the results of the attitude of neutrality when adopted by them;

Seeing that it is, for neutral Powers, an admitted duty to apply these rules impartially to the several belligerents;

Seeing that, in this category of ideas, these rules should not, in principle, be altered, in the course of the war, by a neutral Power,

²⁹ German note, Feb. 16, 1915; *Spl. Supp. Am. Jour. Int. Law*, IX, 90.

except in a case where experience has shown the necessity for such change for the protection of the rights of that Power;

Have agreed to observe the following common rules, which can not however modify provisions laid down in existing general treaties, and have appointed as their plenipotentiaries, namely:³⁰

It seems clear from the context that the preamble was not intended to be used for the purpose desired by Austria. The United States took this view in its reply of August 12, 1915, and stated once for all its position and policy on munitions trade. Its arguments were that it could not sit in judgment on the progress of a war and balance the inequalities of the conflict by restrictions on its commerce with the belligerents; that the practice of nations, including Austria and her ally Germany, had been to trade in munitions regardless of the relative situations of the belligerents; that the United States policy depended on the right to purchase arms from neutral countries in case of foreign attack; that a contrary principle would tend to force militarism on the world and turn nations into armed camps; that the preamble to Convention XIII was not contrary to this, as it made it discretionary with the neutral as to how it should protect its rights, and that the great weight of authority advocated the freedom of trade in munitions. After this unanswerable statement of the American position no further complaints were made by the Central Powers.

The case, however, carries a lesson for us who are interested in the restatement of the rule regarding munitions trade. It is that the preamble to Convention XIII should be eliminated as tending to cloud the clarity of the rules stated in the body of the convention and tending to form bases for arguments by failing belligerents.

In connection with a restatement of the rules regarding munitions trade, reference should be made to the growing tendency in the last quarter century to prohibit the export of munitions to insurgents or rebels engaged in civil strife. There are a few instances where this has been tried out in Europe,³¹ but the practice of the United States is most familiar. I do not refer to the so-called enlistment acts or neutrality laws of the United States to prevent the use of American territory as bases of naval operations or military expeditions. I refer to the Joint Resolution of April 22, 1898, authorizing the President in his discretion to prohibit the export of coal or other material used in war from the ports of the United States, and also to the Joint Resolution of March 14, 1912, providing:

That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe any arms or munitions of war from any place in the United

³⁰ Hague Conventions and Declarations of 1899 and 1907, Scott, p. 209

³¹ Einicke, *op. cit.* pp. 80-112.

States to such country until otherwise ordered by the President or by Congress.

A somewhat similar provision was incorporated in the Espionage Act of June 15, 1917. In the meanwhile, in 1915 President Wilson made a proposal to the A B C countries of South America to embody such a prohibition in a general treaty in the following words:—

Article IV. To the end that domestic tranquillity may prevail within their territory, the high contracting parties further agree not to permit the departure of any military or naval expedition hostile to the established government of any of the contracting parties and to prevent the exportation of arms and munitions of war destined to any person or persons in insurrection or revolt against the government of any of the contracting parties.

The proposed treaty, however, was never concluded. Curiously enough, the same idea cropped up at the Paris Conference, where a general treaty on traffic in arms was signed at St. Germain, September 10, 1919, between the Allied countries. The treaty goes much beyond the Brussels Act of July 2, 1890, which it supplants. The parties agree in general terms to prohibit the export of arms and ammunition used in war, except for the use of the signatory *governments*, and also to prohibit the export of firearms, other than those used in war, when destined to certain closed zones and territories enumerated. So far as I know, this treaty has not been transmitted to the Senate by the President and is not as yet in effect in Europe.

The tendency indicated by the foregoing may well raise some question as to the soundness and the advisability of adding these additional rules to those governing munitions trade. The tendency obliterates the distinction long maintained in the United States between an exportation of arms involving the use of territory as a base of operations and an exportation as a purely commercial venture. The tendency limits greatly the power to exercise the inherent right of revolution against an oppressive government. It tends to an alliance between governments for their maintenance in power. It is based on the same idea of self-satisfaction which we find common in concerts of Powers from the Holy Alliance to the present time. Concerts like to crystallize the then existing situation and overlook the fact that the world is a living organism and a growing one. The world is perhaps old enough to be an adult, but it is not and refuses to be confined by inelastic bonds. I do not think, therefore, that now is the time to have a general agreement on this point like that of St. Germain. It seems to me preferable to have this matter of the export of arms to rebels controlled by municipal law as at present.

PRESIDENT ROOT. I have the pleasure of presenting to the Society to discuss the topic illustrative of the work of Subcommittee No. 2, entitled "Conditional contraband," Mr. Charles Cheney Hyde, Professor of International Law in Northwestern University.

Mr. CHARLES CHENEY HYDE. May I make a brief explanation before reading the statement? When Dr. Scott was good enough some time ago to ask me to take part today, I was simply snowed under in the effort to put through the press a book dealing with international law chiefly as interpreted by the United States, and the only possible means I had of complying with Dr. Scott's request was to secure the permission of the publishers to read a few advance sheets. That consent was readily given, but, Mr. Chairman, the problem is rather difficult for this reason, that while I am able to state the conclusions rather fully which have been reached touching one point, namely, the condition of foodstuffs as conditional contraband, it has been impossible in the brief time to deal with the vast material necessarily concerned. Therefore, if my summaries seem too brief, I ask your respectful indulgence.

CONDITIONAL CONTRABAND¹

ADDRESS BY CHARLES CHENEY HYDE

Professor of International Law in Northwestern University

At the time when the United States declared its independence the experience of nations had developed a practice which, on the one hand, acknowledged the right of a belligerent to seize on the high seas property even of neutral ownership and found on board vessels of whatsoever national character, if destined to the enemy and calculated to aid its operations, and which, on the other, restrained a belligerent in determining under what circumstances property might be justly regarded as bearing such a relation to the enemy. It was the nature of the restraint as well as the scope of the right which it became the task of American statesmen to clarify. The significant fact is that long before the close of the eighteenth century there was an understanding apparent, in England as well as continental Europe, that a belligerent was not free to cut off generally neutral commerce with enemy territory. Such a situation was in sharp contrast to that which had once prevailed, when no State engaged in war hesitated to regard as hostile to itself, and therefore as subject to restraint, the ships or goods of any foreign merchant who ventured to trade with the enemy.²

¹ From the advance sheets of a book entitled: *International Law Chiefly as Interpreted and Applied by the United States*, and read with the consent of the publishers, Messrs. Little, Brown & Company, Boston.

² T. A. Walker, *Hist. Law of Nations*, I, 136, quoted in H. R. Pyke, *Law of Contraband of War*, 30. See, also, E. Nys, *Les Origines du Droit International*, 226-228; Westlake, 2 ed., II, 198; J. B. Moore, "Contraband of War," Philadelphia, 1912, *Proceedings, Am. Philosophical Society*, LI, No. 203, 39.

Concerning the practice of England during the sixteenth century, see Edward P. Cheney, *History of England from the Defeat of the Armada to the Death of Elizabeth*, Philadelphia, 1914, I, chap. xxii, and documents there cited.